IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 5

WCC No. 2008-2088

MELVIN BRIESE

Petitioner

vs.

ACE AMERICAN INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT,
DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT,
AND DENYING RESPONDENT'S REQUEST FOR SANCTIONS

Summary: Respondent moved this Court for summary judgment and also requested sanctions against Petitioner and Petitioner's counsel. Petitioner cross-motioned for summary judgment. Petitioner petitioned this Court for an increase in his average weekly wage calculation and for a 20% penalty on unpaid *Lockhart* attorney fees. Petitioner argues that vacation pay accrued during the four pay periods prior to his injury and paid post-injury should be included in his average weekly wage calculation. Petitioner further argues that the funds he withdrew from his company-sponsored 401(k) account should be utilized in his wage calculation. Respondent contends that accrued vacation paid after the date of injury and monies withdrawn from a 401(k) account are both excluded from the definition of wages pursuant to § 39-71-123, MCA (2003). Respondent also contends that Petitioner is not entitled to a 20% penalty on his *Lockhart* fees pursuant to § 39-71-2907, MCA. Respondent requests the Court to sanction Petitioner and Petitioner's counsel for their allegedly frivolous and meritless claims.

Held: Respondent's motion for summary judgment on Petitioner's entitlement to an increase in his average weekly wage calculation is granted. Respondent's motion for summary judgment regarding the 20% penalty on a *Lockhart* lien is denied. Petitioner's cross-motion for summary judgment on the constitutionality of § 39-71-123, MCA, is denied. Respondent's request for sanctions is also denied. Vacation pay accrued

preinjury but paid post-injury and employer contributions to a pension plan are excluded from the definition of wages when all parts of § 39-71-123, MCA, are read as a whole. Petitioner may seek a 20% penalty on a *Lockhart* lien because the *Lockhart* lien represents a portion of the "full amount of benefits due" Petitioner. Section 39-71-123, MCA, does not violate Petitioner's right to equal or due process. The Court does not find that Petitioner or his attorney have acted in such a way as to warrant sanctions. Even though I do not find some of Petitioner's arguments persuasive, I do not find that the arguments were advanced in bad faith or for any improper purpose.

¶ 1 Petitioner petitioned this Court for an increase in his average weekly wage calculation and for a 20% penalty because of Respondent's alleged unreasonable delay and refusal to pay a *Lockhart* lien. Regarding his wage calculation, Petitioner contends that vacation pay accrued during the four pay periods prior to his injury but paid after his injury should be included in the definition of wages pursuant to § 39-71-123, MCA[1]. Petitioner further contends that funds contributed by his employer to a company-sponsored 401(k) account, which Petitioner then withdrew after his injury, should be included under the definition of wages. Respondent contends that accrued vacation paid after the date of injury and funds withdrawn from a 401(k) account are both excluded from the statutory definition of wages. Respondent also contends that Petitioner's counsel is not entitled to a 20% penalty on his *Lockhart* fees pursuant to § 39-71-2907, MCA.

¶ 2 Respondent moves the Court for an order granting summary judgment in its favor on the issues of Petitioner's request for an increase in his average weekly wage calculation and the 20% penalty on the *Lockhart* lien. Petitioner has cross-motioned for summary judgment arguing that § 39-71-123, MCA, is unconstitutional because it violates his right to equal protection and due process.

Respondent also requests sanctions be assessed against Petitioner pursuant to §39-71-2914, MCA. Respondent argues that Petitioner's claims are not supported by existing law or by a good faith argument for the extension, modification, or reversal of existing law.

Material Facts

¶ 3 The material facts necessary for resolution of these motions are as follows:

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[1] Workers' compensation benefits are determined by the statutes in effect on the date of the claimant's injury. This case is governed by the 2003 version of the Workers' Compensation Act since that was the law in effect on the date of Petitioner's alleged industrial injury.

¶ 3a On August 30, 2004, Petitioner Melvin Briese sustained an injury in the course and scope of his employment with Amerigas, Inc.[2]

¶ 3b At the time of the injury, Amerigas was insured by Respondent Ace American Insurance Co.[3]

¶ 3c Petitioner accrued fifteen days of vacation pay each year.[4] In the four pay periods preceding his injury, he earned 2.4 days of vacation.[5]

¶ 3d Amerigas paid Petitioner for his accrued vacation sometime after the date of his injury.[6]

¶ 3e As an employee of Amerigas, Petitioner participated in a 401(k) plan. Under this plan, Petitioner could contribute a certain amount which would be matched by a contribution from Amerigas.[7]

¶ 3f In 2004 Amerigas contributed $1,758.26 to Petitioner's 401(k) plan. A proportionate amount of this contribution in the four pay periods immediately preceding Petitioner's industrial injury equals approximately $35.16 per week.[8]

¶ 3g Petitioner cashed out his 401(k) plan in 2007.[9]

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[2] Petition for Hearing at 1. Docket Item No. 1.

[3] *Id.*

[4] Affidavit of Melvin Briese. Docket Item No. 16.

[5] Petitioner's Brief Opposing Motion for Summary Judgment and Sanctions and Petitioner's Cross Motion for Summary Judgment and Brief in Support (Petitioner's Brief) at 2. Docket Item No. 18.

[6] Affidavit of Melvin Briese. Docket Item No. 16.

[7] Petitioner's Brief at 2. Docket Item No. 18.

[8] *Id.*

[9] *Id.*

¶ 3h Petitioner's counsel asserted a lien on any medical benefits paid pursuant to *Lockhart v. New Hampshire Ins. Co.*[10] In his petition filed on May 20, 2008, Petitioner asserts that Respondent is liable for a 20% penalty for an unreasonable delay and failure to pay the *Lockhart* lien.[11]

¶ 4 Summary judgment may be granted when no material facts are in dispute and a party is entitled to judgment as a matter of law.[12] Respondent's motion for summary judgment and Petitioner's cross-motion for summary judgment are ripe for a decision.

Issue One: Whether vacation pay accrued preinjury but paid post-injury, and employer 401(k) plan contributions are included in the definition of "wages" pursuant to § 39-71-123, MCA.

¶ 5 Section 39-71-123, MCA, addresses what can be considered wages for purposes of a wage calculation. The statute reads in pertinent part:

> (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:
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> (a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness;
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> (b) backpay or any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan;
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> . . . .
>
> (e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value; and
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> (f) payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement.
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> (2) The term "wages" does not include any of the following:

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[10] *Lockhart,* 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

[11] Petition for Hearing at 2. Docket Item No. 1.

[12] *Sherner v. Conoco, Inc.,* 2000 MT 50, ¶ 10, 298 Mont. 401, 995 P.2d 990.

. . . .

(b) the amount of the payment made by the employer for employees, if the payment was made for:

(i) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code;

. . . .

(c) vacation or sick leave benefits accrued but not paid;

. . . .

(3) . . . for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages . . . .

¶ 6 Petitioner argues that the vacation pay he accrued during the four pay periods prior to his injury should be utilized in his average weekly wage calculation because his vacation pay was ***paid***, albeit post-injury. Petitioner notes that § 39-71-123(2)(c), MCA, requires only that the vacation benefits be paid and does not specify that they be paid preinjury. Petitioner contends, therefore, that "wages" includes vacation pay earned preinjury and paid post-injury.

¶ 7 Respondent argues that Petitioner's claim for accrued vacation pay conflicts with § 39-71-123, MCA. Respondent argues that this statute expressly excludes accrued vacation pay from the definition of wages and the calculation of average weekly wage.

¶ 8 When interpreting a statute, the Court is to read all parts of the statute as a whole and strive to give effect to all of its provisions.[13] Section 39-71-123(2)(c), MCA, excludes vacation or sick leave benefits accrued but not paid. Section 39-71-123(3), MCA, provides that, when calculating average actual earnings, the period of time utilized is the period ***preceding*** the employee's injury. Reading the statute as a whole, therefore, I conclude that vacation benefits not paid prior to an injury are excluded from the definition of wages. Petitioner is not entitled to an increase in his wage calculation based on vacation pay accrued preinjury but paid post-injury.

¶ 9 Regarding the employer contributions to Petitioner's 401(k) plan, Petitioner argues that the funds Amerigas contributed during the four pay periods preceding his injury, which he then withdrew post-injury, should be included in his wage calculation. Petitioner argues

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[13] *Barnard v. Liberty Northwest Ins. Corp.,* 2008 MT 254, ¶ 17, 345 Mont. 81,189 P.3d 1196.

that upon withdrawal, the funds ceased to be a "retirement or pension," which is prohibited by § 39-71-123(2)(b)(i), MCA, and transformed into something more akin to profit sharing, which is allowed by § 39-71-123(1)(f), MCA.

¶ 10 Respondent argues that § 39-71-123(2)(b)(i), MCA, expressly excludes funds paid into a qualified pension or retirement plan as defined by the Internal Revenue Code. Therefore, Respondent argues, irrespective of how Petitioner characterizes the post-injury withdrawal, the statute excludes employer contributions to a pension from the definition of wages.

¶ 11 Respondent is correct that § 39-71-123(2)(b)(i), MCA, unambiguously excludes funds paid to a retirement or pension by an employer for an employee from the definition of wages. Although Petitioner argues that the legislative history supports his contention that the 401(k) plan funds should be considered "wages" upon their withdrawal, the Court discerns the intent of the legislature from the text of the statute if the words are clear and plain.[14] Section 39-71-123(2)(b)(i), MCA, could not be more clear or more plain. Petitioner is not entitled to an increase in his wage calculation based on the funds contributed by his employer to his 401(k) plan.

Issue Two: Whether a 20% penalty may be assessed for alleged failure to timely pay a *Lockhart* lien.

¶ 12 On August 16, 2005, in a previous action filed by Petitioner, this Court held that Petitioner was entitled to workers' compensation benefits for the August 30, 2004, work-related injury.[15] As a result of this Court's decision, a *Lockhart* lien attached to medical benefits owed to Petitioner. In Petitioner's current petition, he requested Respondent provide an accounting of the *Lockhart* lien and pay the appropriate lien on medical benefits.[16] Petitioner further alleged that Respondent unreasonably delayed or refused to pay the *Lockhart* lien and that the unreasonable delay and refusal warrants imposition of a 20% penalty.[17]

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[14] *S.L.H. v. State Compen. Mut. Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, 15 P.3d 948.

[15] *Briese v. Ace American Ins. Co.,* 2005 MTWCC 50.

[16] Petition for Hearing at 4. Docket Item No. 1.

[17] *Id.*

¶ 13 The *Lockhart* lien derives from the Montana Supreme Court's opinion in *Lockhart v. New Hampshire Insurance Co.*[18] In *Lockhart,* the Supreme Court held that an attorney representing an injured claimant is entitled to collect an attorney fee based upon the amount of disputed medical benefits ultimately paid by the insurer.[19] The Court further held an attorney fee lien attaches to the payment of those benefits.[20] There is no dispute that Petitioner's counsel was entitled to a fee based on the medical benefits paid. This dispute centers on whether a 20% penalty can be assessed for an unreasonable delay or refusal to pay the *Lockhart* lien.

¶ 14 Section 39-71-2907, MCA, sets forth the law governing a penalty. It provides, in pertinent part, as follows:

> (1) The workers' compensation judge may increase by 20% ***the full amount of benefits due a claimant*** during the period of delay or refusal to pay . . . .[21]

¶ 15 In *Lockhart*, the Supreme Court held:

> We agree with Lockhart and Petak that medical benefits are not the property of the medical providers simply because the medical providers are the actual recipients of the money. Nor do we believe that the medical benefits are simply an obligation of the insurer. The benefits are the individual claimant's and as such, the claimant should be allowed to pay the attorney fees ***out of his or her medical benefits.***"[22]

¶ 16 The fact that a *Lockhart* lien is paid directly to a claimant's attorney is of no consequence in determining whether that portion of the claimant's medical benefits are subject to a penalty. In *Carlson v. Cain*,[23] the Supreme Court rejected essentially this very argument, characterizing as "specious" the insurer's argument that "because the payments

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[18] *Lockhart v. New Hampshire Ins. Co.,* 1999 MT 205, 295 Mont 467, 984 P.2d 744.

[19] *Lockhart*, ¶ 25.

[20] *Id.*, ¶ 26.

[21] § 39-71-2907, MCA. (Emphasis added.)

[22] *Lockhart,* ¶ 24. (Emphasis added.)

[23] *Carlson v. Cain,* 216 Mont. 129, 700 P.2d 607 (1985).

were made to the medical providers and not to the claimant herself, that the penalty provision should not apply."[24] It would be incongruous to hold that the portion of the claimant's medical benefits which is paid directly to the medical provider is subject to a penalty, and yet the portion of the claimant's medical benefits which is paid directly to his attorney is not.

¶ 17 The Supreme Court has characterized the *Lockhart* lien as a payment which the claimant makes to his or her attorney "out of his or her medical benefits."[25] Section 39-71-2907(1), MCA, provides that a 20% penalty may be imposed on the "full amount of benefits due a claimant during the period of delay or refusal to pay." Therefore, since the *Lockhart* lien constitutes a portion of the "full amount of benefits due" Petitioner, he may seek a penalty pursuant to § 39-71-2907(1), MCA, for any alleged unreasonable delay or refusal to pay that portion of the benefit.

Issue Three: Whether the Court has jurisdiction to determine whether Petitioner is entitled to assert a *Lockhart* lien.

¶ 18 Respondent argues that this Court lacks jurisdiction to decide the issue of a *Lockhart* lien. Respondent argues that a *Lockhart* lien constitutes an "award" of attorney fees which is proscribed by the 2003 amendments to §§ 39-71-611 and -612, MCA. Respondent argues that if the Court lacks jurisdiction to "award" a *Lockhart* lien, the Court must therefore lack jurisdiction to award a penalty on any alleged failure to pay a *Lockhart* lien. Respondent's argument is without merit.

¶ 19 The statutes upon which Respondent relies address the potential liability of ***an insurer*** for reasonable attorney fees if the Court determines the actions of the insurer were unreasonable in its payment of benefits. The 2003 amendments to §§ 39-71-611 and -612, MCA, limit the award of attorney fees against an insurer to the provisions allowed by those statutes. A *Lockhart* lien, conversely, addresses the payment of attorney fees ***paid by the claimant*** "out of his or her medical benefits."[26] Therefore, Respondent's reliance on these statutes for the argument that this Court lacks jurisdiction to determine a *Lockhart* lien is misplaced.

Issue Four: Whether § 39-71-123, MCA, is unconstitutional because it violates Petitioner's right to equal protection.

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[24] *Carlson*, 216 Mont. at 138, 700 P.2d at 613 at 138.

[25] *Lockhart,* ¶ 24.

[26] *Lockhart*, ¶ 25. (Emphasis added.)

¶ 20 A party challenging the constitutionality of a statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt.[27] The first prerequisite to a meritorious equal protection challenge is demonstrating that a classification has been adopted that affects two or more similarly situated groups in an unequal manner.[28] Consequently, the Court must first identify the classes involved and determine if they are similarly situated.[29]

¶ 21 In this case, Petitioner has identified the classes at issue as: (1) injured workers who receive part of their compensation in fringe benefits such as room and board and/or free meals; and (2) injured workers who receive part of their compensation in a savings/401(k) plan.[30] Petitioner's challenge must fail because he has attempted to artificially create two classes where only one exists. Two classes do not exist where every claimant is treated equally.[31] In order to be two distinct classes, the alleged class members must indeed be distinguishable from each other. It is true that § 39-71-123, MCA, identifies certain fringe benefits that will be included in a wage calculation and others that will not. However, the mere fact that certain fringe benefits are or are not included does not create distinct classes of workers. Any given individual may receive some, all, or none of the fringe benefits Petitioner has identified in ***both*** classes. Petitioner has not identified a class of workers who exclusively receive one type of fringe benefit to the exclusion of the other. Since there are not two separate classes of claimants, therefore, an equal protection analysis is not necessary.[32] Accordingly, I hold that § 39-71-123, MCA, does not violate equal protection based on the reasons advanced by Petitioner.

Issue Five: Whether § 39-71-123, MCA, is unconstitutional because it violates Petitioner's right to due process.

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[27] *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

[28] *Bustell v. AIG Claims Service, Inc.,* 2004 MT 362, ¶ 20, 324 Mont. 478, 105 P.3d 286.

[29] *Id.*

[30] Petitioner's Response Supporting Cross Motion for Summary Judgment at 7. Docket Item No. 28.

[31] *Bustell*, ¶ 22.

[32] *Id.*

¶ 22 In his brief opposing Respondent's motion for summary judgment and supporting his own cross-motion for summary judgment, Petitioner devotes a single paragraph to his argument that § 39-71-123, MCA, denies him due process. This single paragraph amounts to little more than a conclusory statement that the statute violates due process because Petitioner says it does. Although Petitioner cites generally to *Bowers v. State Compensation Insurance Fund*[33] in purported support of his argument, his "analysis" of *Bowers* and its potential application to the present case begins and ends with its citation. Petitioner does not even cite the Court to a specific paragraph in *Bowers*. In the absence of any discernable argument, therefore, I conclude that Petitioner has not met his heavy burden to prove § 39-71-123, MCA, violates his right to due process.

Issue Six: Whether sanctions should be imposed against Petitioner.

¶ 23 Section 39-71-2914, MCA, governs the award of sanctions. The statute reads as follows:

> (1) Every petition, pleading, motion, or other paper of a party appearing before the workers' compensation court and represented by an attorney must be signed by at least one attorney of record in his individual name. The signer's address also must be stated.
>
> . . . .
>
> (3) The signature of an attorney or party constitutes a certificate by him that:
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> (a) he has read the petition, pleading, motion, or other paper;
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> (b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;
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> (c) it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and
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> (d) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay the other party or parties the amount of the reasonable expense incurred

[33] *Bowers v. State Compen. Ins. Fund,* 1998 MTWCC 64.

because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

¶ 24 I do not find that Petitioner or his attorney have acted in such a way as to warrant sanctions. As to the legal issue of whether a penalty may be imposed on a failure to pay a *Lockhart* lien, Petitioner has successfully defeated Respondent's motion for summary judgment. With respect to the wage calculation issue, although I was not ultimately persuaded by Petitioner's arguments, Petitioner advanced plausible arguments and I see no evidence that they were interposed for any improper purpose.

ORDER

¶ 25 Respondent's motion for summary judgment on the issue of Petitioner's request for an increase in his average weekly wage calculation is **GRANTED.**

¶ 26 Respondent's motion for summary judgment on the issue of the 20% penalty on the *Lockhart* lien is **DENIED.**

¶ 27 Petitioner's cross-motion for summary judgment on the constitutional issue is **DENIED.**

¶ 28 Respondent's request for sanctions is **DENIED.**

DATED in Helena, Montana, this 20th day of February, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Chris J. Ragar
Kelly M. Wills
Submitted: August 5, 2008 and August 21, 2008